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IN THE

Supreme Court of the United States

October Term, 1963

No. 978

HENRIETTA BRODY, doing business as ALBERT FRENCH RESTAURANT,

Petitioner,

vs.

MARTIN C. EPSTEIN, Chairman of the New York State Liquor Authority, and the NEW YORK STATE LIQUOR AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1963

No.

HENRIETTA BRODY, doing business as ALBERT FRENCH RESTAURANT,

Petitioner,

vs.

MARTIN C. EPSTEIN, Chairman of the New York State Liquor Authority, and the NEW YORK STATE LIQUOR AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Henrietta Brody, doing business as Albert French Restaurant, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York affirming the decision of the Appellate Division which confirmed respondents' order suspending petitioner's liquor license.

Opinions Below

All decisions below were without opinion.

Jurisdiction

The Court of Appeals of the State of New York entered its judgment on November 21, 1963, affirming the decision of the Appellate Division of the Supreme Court of the

State of New York which confirmed the order of the respondents based upon an alleged violation of Section 65 of the Alcoholic Beverage Control Law of the State of New York. By order dated January 9, 1964, the Court of Appeals denied petitioner's motion for a rehearing and granted petitioner's motion to amend the remittitur.

Upon the appeal herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, *viz.*: petitioner contended that a delay of four months on the part of the State Liquor Authority in notifying her of an alleged violation of § 65, subd. 1, of the Alcohol Beverage Control Law was a denial of due process under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no such denial. All concurred except Van Voorhis, J., who dissented and voted to deny the motion upon the ground that the constitutional question was not presented by the petition.

The jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the United States Code.

Question Presented

The question squarely presented is whether the unexplained failure of an administrative agency to notify an accused of an alleged violation of law for some four months after learning of the alleged violation constitutes a failure to give reasonable notice and effectively destroys the right to defend guaranteed by the due process clause of the 14th Amendment to the Constitution.

Constitutional Provision Involved

Pertinent portions of the United States Constitution, Amendment 14, are reprinted in the Appendix (p. 9 *infra*).

Statement of the Case

On January 29, 1962, for the first time respondents charged petitioner with a violation of Section 65 of the Alcoholic Beverage Control Law, which alleged violation occurred on the evening of September 16, 1961 (46-50).*

Thus, petitioner was first apprised of the complaint resulting in a suspension of her license some four and one-half months after the alleged service of alcoholic beverages to the minors in question (46-50). This, despite the fact that the mother of one of the girls, Mrs. Margaret McCool, had registered a complaint with the State Liquor Authority within two days of the evening on which the girls were allegedly served (175-177).

Immediately upon being apprised of the complaint lodged against her, petitioner requested the State Liquor Authority to supply a description of the minors and the location in the restaurant where they were allegedly seated. This was not forthcoming until the hearings commenced.

This delay in notifying petitioner in the first instance and in failing to provide the information requested, for which no excuse is even proffered, effectively deprived petitioner of any opportunity to adequately investigate the facts or to obtain witnesses to explain or defend against a charge made against her. Under the circumstances, where the petitioner employs an average of fourteen (14) waiters (165) and serves a large clientele it cannot be said that she was afforded anything resembling a full and fair opportunity to present proof or to offer evidence in explanation or rebuttal of the charge in issue.

The denial of due process was raised in the Appellate Division based upon the facts elicited at the hearing before the New York State Liquor Authority. Petitioner prior to

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*Figures in parentheses refer to folios of Certified Record on Appeal in the Court of Appeals.

his appeal to the Court of Appeals of the State of New York obtained an order dated April 4, 1963, certifying that a constitutional question was involved on the appeal (2B). Subsequently, the Court of Appeals by order dated January 9, 1964, stated in relevant part as follows:

> "Upon the appeal herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz.: petitioner contended that a delay of four months on the part of the State Liquor Authority in notifying her of an alleged violation of § 65, subd. 1, of the Alcoholic Beverage Control Law was a denial of due process under the Fourteenth Amendment to the Constitution of the United States."

Reasons for Granting the Writ

This Court has already noted the great extent to which regulatory commissions and administrative agencies have been invested with the power to administer law in this land. *Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 304 (1937). The question squarely presented is whether the unexplained failure of an administrative agency to notify an accused of an alleged violation of law for some four months after learning of the alleged violation, constitutes a failure to give reasonable notice and effectively destroys the right to defend guaranteed by the due process clause of the Fourteenth Amendment to the Constitution.

The notorious sluggishness of administrative agencies, state and federal, should not be tolerated where they are invested with the judicial function of administering laws.

As the statement of facts (*supra*, pp. 3, 4) shows, the nature of the violation with which petitioner was charged inherently makes the preparation of a defense extremely difficult. Here, the unexplained, and more, inexplicable, four month delay in notifying petitioner of the charge against her was the equivalent of a failure to

give notice—it made impossible the preparation of a defense.

In holding that petitioner was not denied due process in this case, the Court of Appeals of the State of New York decided an important federal question in a manner not in accord with the decisions of this Court. It would be salutary for this Court to reaffirm the rule that parties in state proceedings are entitled to the safeguards guaranteed by the due process clause of the Fourteenth Amendment. *Morgan* v. *United States*, 304 U. S. 1, 22 (1938); *Louisville and Nashville Rd. Co.* v. *Schmidt*, 177 U. S. 230 (1900).

This Court, in setting aside an administrative proceeding on the ground that it failed to provide a full and fair hearing, stated:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." *Morgan* v. *United States*, 304 U. S. 1, 18 (1938).

Where, as here, the petitioner operates a restaurant catering to a large transient clientele, the unexplained delay of some four months in giving notice effectively destroyed her ability to defend.

The seriousness of this issue was stated by Mr. Justice Cardozo in *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n of Ohio*, 301 U. S. 292, 304-5 (1937):

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. . . . Indeed, much that they do within the realm of administrative discretion is exempt

> fro. supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' * * * of a fair and open hearing be maintained in its integrity. * * * The right to such a hearing is one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Furthermore, this Court has held that the basic constitutional right to sufficient notice and adequate opportunity to defend in a State proceeding is to be protected even where the agency argues that the individual has no defense. *Louisville and Nashville Rd. Co.* v. *Schmidt*, 177 U. S. 230, 239 (1900).

Analogy may be made to the federal decisions holding that the failure to promptly bring an individual to trial is a deprivation of the individual's right to interpose a defense. *Petition of Provoo*, 17 F. R. D. 183 (Dist. Ct. of Md. 1955). In *United States* v. *McWilliams*, 163 F. 2d 695, 696 (Dist. of Col. 1947), the Court stated the underlying reasons for this constitutional requirement as follows:

> "As in all long-delayed cases, the witnesses now are scattered; some are not accessible, more particularly to the defendants who are without funds; the memories of witnesses as to events occurring many years ago are not clear. It is for these reasons among others that the Constitution of the United States requires a speedy trial * * *."

Grievous prejudice to petitioner is obvious. However, prejudice is irrelevant, for the right to reasonable notice and fair opportunity to defend is essential to due process, and courts will not calculate the amount of prejudice its denial entails. *United States* v. *Claudy*, 204 F. 2d 624, 627 (1953).

It would be salutary for this Court to grant certiorari and reaffirm the rule requiring that regulatory agencies abide by the requirements of fairness imposed by the Fourteenth Amendment to the Constitution.

CONCLUSION

For the reasons, stated above, it is prayed that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York.

Respectfully submitted,

EDWARD D. BURNS,
Attorney for Petitioner,
598 Madison Avenue,
New York 22, N. Y.

JOEL S. STERN,
of Counsel.

APPENDIX

Pertinent Portion of the United States Constitution

AMENDMENT XIV.—CONSTITUTION OF THE UNITED STATES

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Order of Court of Appeals Denying Reargument and Amending Remittitur

STATE OF NEW YORK

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of January A. D. 1964.

Present,

Hon. Charles S. Desmond,
Chief Judge, presiding.

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1 Mo. No. 1

In the Matter of the Application of
Henrietta Brod, d/b/a Albert French Restaurant,
Appellant,
for a review &c.,

vs.

Martin C. Epstein, Chairman of the New York State Liquor Authority, and the New York State Liquor Authority,
Respondents.

A motion for a reargument and to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion for reargument be and the same hereby is denied, and it is

Order of Court of Appeals Denying Reargument and Amending Remittitur

ORDERED, that the said motion to amend the remittitur be and the same hereby is granted; return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz.; petitioner contended that a delay of four months on the part of the State Liquor Authority in notifying her of an alleged violation of § 65, subd. 1, of the Alcoholic Beverage Control Law was a denial of due process under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no such denial. All concur except Van Voorhis, J., who dissents and votes to deny the motion upon the ground that the constitutional question was not presented by the petition.

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk.

Order of Affirmance by the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of November in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

Witness,
The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur November 21, 1963.

No. 279

In the Matter of the Application of
HENRIETTA BRODY, doing business as ALBERT FRENCH RESTAURANT,

Appellant,

for a review &c.,

vs.

MARTIN C. EPSTEIN, Chairman of the New York State Liquor Authority, & ano.,

Respondents.

BE IT REMEMBERED, That on the 28th day of August in the year of our Lord one thousand nine hundred and sixty-three, Henrietta Brody, doing business as Albert French Restaurant, the appellant in this cause, came here unto the Court of Appeals, by Saxe, Bacon & O'Shea, her attorneys, and filed in the said Court a Notice of Appeal and

return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Martin C. Epstein, Chairman of the New York State Liquor Authority, & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Hyman Amsel, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Joel S. Stern, of counsel for the appellants, and by Mr. Emanuel D. Black, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And thereafter motion to amend the remittitur having been granted this remittitur is here amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz.: Petitioner contended that a delay of four months on the part of the State Liquor Authority in notifying her of an alleged violation of § 65, subd. 1, of the Alcoholic Beverage Control Law was a denial of due process under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no such denial.

And it was also further ordered that this records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Order of Court of Appeals Granting Appellant's Motion for Certificate That a Constitutional Question is Involved Herein

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of April A. D. 1963.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 293

In the Matter of the Application of
HENRIETTA BRODY, d/b/a ALBERT FRENCH RESTAURANT,

Appellant,

for a review &c.,

vs.

MARTIN C. EPSTEIN,
Chairman of the New York State Liquor Authority,
and the New York State Liquor Authority,

Respondents.

A motion having heretofore been made herein upon the part of the appellant for a certificate that a constitutional question is involved on the appeal herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

[SEAL]

A copy

GEARON KIMBALL
Deputy Clerk

Order of Court of Appeals Denying Cross-Motion of Respondents to Dismiss Appeal Herein

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of April A. D. 1963.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

---

1 Mo. No. 293

In the Matter of the Application of
HENRIETTA BRODY, d/b/a ALBERT FRENCH RESTAURANT,
Appellant,

for a review, &c.,

vs.

MARTIN C. EPSTEIN, Chairman of the New York State Liquor Authority, and the NEW YORK STATE LIQUOR AUTHORITY,
Respondents.

A cross-motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said cross-motion be and the same hereby is denied.

A copy

GEARON KIMBALL,
Deputy Clerk.

(SEAL).

Order of Confirmance

At a term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 6th day of December, 1962.

Present—

Hon. Benjamin J. Rabin,
Justice Presiding,

" Francis L. Valente,
" James B. M. McNally,
" Samuel W. Eager,
" Aron Steuer,
Justices.

5378

In the Matter of the Application of Henrietta Brody, doing business as Albert French Restaurant,

Petitioner,

for a review pursuant to Article 78 of the Civil Practice Act,

vs.

Martin C. Epstein, Chairman of the New York State Liquor Authority, and the New York State Liquor Authority,

Respondents.

The above named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Act, for a review by the court of a determination of the respondent, New York State Liquor Authority, suspending petitioner's restaurant liquor license for a period of 25 days, 15 of which were deferred, after a hearing upon charges; and for other relief,

Order of Supreme Court, New York County, Transferring Proceeding to Appellate Division

And this proceeding having been transferred by order of said court, entered on the 7th day of September, 1962, to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Mr. Joel S. Stern of counsel for the petitioner, and by Mr. Lawrence Kunin of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent be and the same hereby is confirmed and the petition dismissed with $20 costs and disbursements to the respondents.

Enter:

VINCENT A. MASSI,
Clerk.

Order of Supreme Court, New York County, Transferring Proceeding to Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL TERM—PART I

Index Number 14987—Year 1962

Present:

HON. SAUL S. STREIT, *Justice.*

HENRIETTA BRODY, ETC.,

Plaintiff,

against

MARTIN C. EPSTEIN, ETC.,

Defendants.

The following papers numbered 1 to 9, read on this motion, submitted this 7th day of September, 1962.

Calendar No. 129.

	Papers Numbered
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Upon the foregoing papers this matter is transferred to the Appellate Division pursuant to § 1296 C. P. A. Stay of 30 days granted to petitioner.

Dated: September 7, 1962.

S. S. S.,
J. S. C.

Authority's Order of Suspension

NEW YORK STATE LIQUOR AUTHORITY

Serial No. NY RL 14109

In the Matter of Proceedings to Suspend, Cancel or Revoke
License Number: 1 RL 14109

Issued to: HENRY BRODY dba ALBERT FRENCH RESTAURANT

Licensed Premises: 65 University Place
New York 3, N. Y.

Proceedings having been duly instituted pursuant to the provisions of the Alcoholic Beverage Control Law, (Chapter 478 of the Laws of 1934, as amended) to suspend, cancel

or revoke the above license issued to the licensee for premises located at the address stated above and the licensee having duly pleaded "no contest" to the charges contained in the notice of hearing or a hearing having been duly held by the State Liquor Authority in connection with said proceedings, and

Said proceedings having been duly considered by the State Liquor Authority at a meeting duly held on the 21st day of August, 1962, and due deliberation having been had thereon, and the Authority having duly adopted the findings of the hearing officer and duly found that the licensee violated Section 65 of the Alcoholic Beverage Control Law in that she sold, delivered or gave away or permitted to be sold, delivered or given away, alcoholic beverages to minors actually or apparently, under the age of 18 years, on September 16, 1961.

IT IS HEREBY ORDERED that the license aforesaid issued to said licensee for the above described premises be, and the same hereby is SUSPENDED* for the period hereinafter specified, and

IT IS FURTHER ORDERED that said licensee be, and hereby is, prohibited from trafficking in alcoholic beverages for the period beginning on the 10th day of September, 1962, at 10 A. M.; and ending on the 20th day of September, 1962, at 10 A. M.; and

IT IS FURTHER ORDERED that said licensee surrender said license forthwith to the State Liquor Authority or its duly

---

* 25 days suspension (x days remitted on "No Contest" plea). 10 days to be served forthwith—Execution of balance of penalty, to wit 15 days will be temporarily deferred, subject to being put into effect in the event the Authority, within its sole discretion, is satisfied from information it receives or obtains that the licensee has not taken practical precautions to assure the proper conduct of the licensed premises since the date of any violation set forth above or within twelve months from the date hereof.

authorized representative, upon commencement of this said period of suspension, and

IT IS FURTHER ORDERED that failure by the licensee to comply with the terms of this order shall result in the cancellation or revocation of the said license in accordance with the provisions of the Alcoholic Beverage Control Law.

Dated August 22, 1962

STATE LIQUOR AUTHORITY
MARTIN C. EPSTEIN
Chairman

Certified by
WILLIAM E. BANDON, JR.
Secretary to the Authority

This order of suspension must be publicly displayed in the following manner:

If there be a door opening from the street into the licensed premises and a window facing the street upon which such door opens, such order shall be displayed in such window so that it may be readily seen from the street. If the licensed premises are otherwise located, such order shall be affixed to the door of the entrance to the premises.

Please take notice that any person who shall sell any alcoholic beverage during the suspension period shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $200 or by imprisonment in a county jail or penitentiary for a term of not more than six months or both. (Section 130 of the Alcoholic Beverage Control Law.)

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OCTOBER TERM, 1963

No. 978

HENRIETTA BRODY, doing business as ALBERT FRENCH RESTAURANT,

Petitioner,

against

MARTIN C. EPSTEIN, Chairman of the New York State Liquor Authority, and the NEW YORK STATE LIQUOR AUTHORITY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

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First Assistant Attorney General

HYMAN AMSEL
Counsel for State Liquor Authority
of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 978

HENRIETTA BRODY, doing business as ALBERT FRENCH RESTAURANT,

Petitioner,

against

MARTIN C. EPSTEIN, Chairman of the New York State Liquor Authority, and the NEW YORK STATE LIQUOR AUTHORITY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The New York Appellate Division, First Department, on December 6, 1962 confirmed the determination of the New York State Liquor Authority *suspending* petitioner's restaurant liquor license for a ten-day period. This confirmation, without opinion, is reported in 18 A. D. 2d 619 (not otherwise reported). The New York Court of Appeals affirmed the confirmation order of the Appellate Division, also without opinion, on November 21, 1963. Reported, 13 N. Y. 2d 1038, 245 N.Y.S. 2d 605, 195 N. E. 2d 313. The Court of Appeals denied a motion for reargument, but granted the motion to amend the remittitur on January 9,

1964 (Pet. Br., p. 2). Reported, 13 N. Y. 2d 1119, 247 N.Y.S. 2d 118, 196 N. E. 2d 552. Judge Van Voorhis of the Court of Appeals concurred in the affirmance of the order but dissented from the amendment of the remittitur, pointing out that alleged constitutional question was not raised in the petition by which the judicial review was commenced.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

Question Sought to Be Presented

Does the fact that a four-month interval occurred after receipt of a letter-complaint from a member of the public before the State Liquor Authority served charges upon a licensee in a disciplinary proceeding alleging a violation of law (Alcoholic Beverage Control Law, Consol. Laws, ch. 3-B, § 65, subd. 1, sale of liquor to minors) constitute a denial *per se* of due process under the Fourteenth Amendment? Is such a question available for review when it had not been presented in petitioner's state court petition for review of the administrative agency's action nor raised at all by petitioner before such agency, by way of defense or otherwise?

Statement

(1)

Petitioner is a restaurant licensee. The Liquor Authority received a complaint by letter on September 22, 1961 from the mother of a girl under the age of eighteen years that her daughter and others had been illegally served the liquor.

After consideration of the letter, on January 29, 1962 the Authority served charges upon petitioner alleging that

she, as licensee, had violated § 65 of the Alcoholic Beverage Control Law in that she sold, delivered or gave away or permitted to be sold, delivered or given away alcoholic beverages to minors actually or apparently, under the age of eighteen years on September 16, 1961.

On February 8, 1962 petitioner served her demand for a bill of particulars in which she requested, among other things, the names, addresses and the dates of birth of the minors so served. *On the same day* respondents responded to this demand and furnished the information requested.

The statement in petitioner's brief that she was "effectively deprived of any opportunity to adequately investigate the facts or to obtain witnesses" (p. 3) is not supported by a scintilla of such proof in the record. Petitioner had an unhampered opportunity to defend.

Several months elapsed between the date of the service of charges and the completion of the hearing. The original hearing date was deferred at the request of petitioner and several continuances were also granted at her request and petitioner was allowed to produce additional testimony (178-188). Hearings were held on April 12, April 26 and May 10, 1962. No further continuance of the hearing was sought by petitioner, who not only did not testify at the hearing but also was conspicuous by her absence from the hearing so that she would not perchance be called to testify.

After the completion of such hearings, the hearing commissioner prepared for the consideration of the Authority a summary of the proceeding before him and a statement of his findings in which he recommended that the charge be sustained.

Thereafter, on August 22, 1962 the Authority, after consideration of the stenographic transcript of the hearings, the exhibits in evidence and the summary and findings of the hearing commissioner, adopted such findings and ordered that petitioner's restaurant liquor license be suspended for a period of twenty-five days only ten of

which were to take effect and fifteen of which were to be deferred subject to being put into effect in the event the Authority found subsequently that the licensee had not taken practical precautions to assure the proper conduct of the licensed premises for a period of twelve months).

(2)

Neither in her petition to the state Supreme Court nor in the administrative proceeding did petitioner allege or raise the due process question now sought to be presented.

The record is devoid of any proof that the time lapse between the date of receipt of the letter-complaint and the service of the charges was unreasonable or improperly motivated or violated any statute or administrative rule or regulation.

The Alcoholic Beverage Control Law § 118 (App. "A", p. 7), authorizes respondents in license disciplinary proceedings to include "causes or violations occurring during the license period immediately preceding the issuance of such license or permit." The violation here occurred during the *existing* license period. This New York statute does not require that the facts or conduct which may justify license disciplinary action be called to the attention of the licensee prior to service of charges.

No suggestion is made by petitioner that her discipline was barred by any statute of limitations or by any other statute.

The Lack of Any Substantial Basis in the Case

The contention that respondents were under a duty to notify petitioner *immediately* when they received the letter-complaint from the mother of one of the adolescents illegally served with liquor is untenable. Respondents were entitled to a reasonable period for the evaluation of the

letter-complaint and the necessary investigation to determine its verity before charges were served upon the licensee.

No responsible administrative body would serve charges or expose the fact of the complaint simply upon the basis of a letter-complaint without more. The New York courts have in prior instances, as in the present case, rejected the wholly untenable claim of petitioner. *Matter of West 151st St. Liquor Store Inc.* v. *State Liquor Authority*, 13 A. D. 2d 731, 214 N.Y.S. 2d 604 (1961), aff'd 11 N. Y. 2d 678, 225 N.Y.S. 2d 754, 180 N. E. 2d 909 (1962). See also *Matter of Colonial Liquor Distributors* v. *O'Connell*, 295 N. Y. 129, 65 N. E. 2d 745 (1946). Within the period of any statutory limitation, the determination of whether or when to serve charges rests in the sound discretion of the administrative officials. *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 87 L. Ed. 579 (1943).

Reference by petitioner to the rules applicable in criminal cases, which are not applicable to civil actions even in the federal courts, *Hannah* v. *Larche*, 363 U. S. 420, 440, fn. 16 (1960), is not helpful to her contention. Apart from the fact that it is baseless here to contend that a delay of four months in the service of charges was "a deprivation of the individual's right to interpose a defense" (Pet. Br. p. 6), it is well established that the right to a speedy trial in criminal cases does not arise until after a prosecution is commenced.

Any delay occurring between commission of the offense and commencement of the prosecution is controlled by the applicable statute of limitations. *Parker* v. *United States*, 252 F. 2d 681 (6th Cir., 1958), cert. den. 356 U. S. 964 (1958); *Hoopengarner* v. *United States*, 270 F. 2d 465 (6th Cir., 1959); *United States* v. *Abrams*, 29 F.R.D. 178 (S.D.N.Y. 1961).

The period of four months between the date of the letter-complaint and the service of charges is less than the period

of six months for the service of a complaint by the NLRB stipulated in 29 U.S.C. § 160(b), discussed in *Local Lodge No. 1424* v. *N.L.R.B.*, 362 U. S. 411, 4 L. Ed. 2d 832 (1960). No question is raised here that the New York *statute* is invalid by reason of its limitations provision or by reason of its failure to include a provision mandating action upon all complaints within a specified period less than the annual license period.

In any event, it is plainly frivolous to contend that a time lag of four months was so offensive as to justify *per se* the raising of a due process question. The petitioner here was fully accorded due process in connection with the charge resulting in the short suspension of her license. See *Cella* v. *United States*, 208 F. 2d 783, 789 (7th Cir., 1953), cert. den. 347 U. S. 1016, 98 L. Ed. 1138 (1954). *Schwebel* v. *Orrick*, 153 F. Supp. 701 (D.D.C. 1957), aff'd per curiam, 251 F. 2d 919 (D. C. Cir. 1958), cert. den. 356 U. S. 927 (1958).

CONCLUSION

No substantial federal question exists. The petition for a writ of certiorari should be denied.

Dated, New York, April 30, 1964.

Respectfully submitted,

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Appendix A.

ALCOHOLIC BEVERAGE CONTROL LAW

§ 118. Revocation of licenses for cause

Any license or permit issued pursuant to this chapter may be revoked, cancelled or suspended for cause, and must be revoked for the following cause:

1. Conviction of the licensee, permittee or his agent or employee for selling any illegal alcoholic beverages on the premises licensed.

2. For transferring, assigning or hypothecating a license or permit.

Notwithstanding the issuance of a license or permit by way of renewal, the liquor authority may revoke, cancel or suspend such license or permit, as prescribed by this section and section one hundred nineteen of this chapter, for causes or violations occurring during the license period immediately preceding the issuance of such license or permit, and may recover, as provided in section one hundred twelve of this chapter, the penal sum of the bond on file during said period.